

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE ESTATE OF MARGARETTE F. EBY
By its Personal Representative,
DAYLE TRENTADUE,

Plaintiff/Appellee,

Supreme Court No. 128579, 128623,
128624, 128625

Court of Appeals No. 252155, 252207,
252209

Genesee Circuit Case No. 02-74145-NZ

vs.

BUCKLER AUTOMATIC LAWN SPRINKLER
COMPANY, SHIRLEY GORTON, LAURENCE
W. GORTON,

Defendants/Appellants,

and

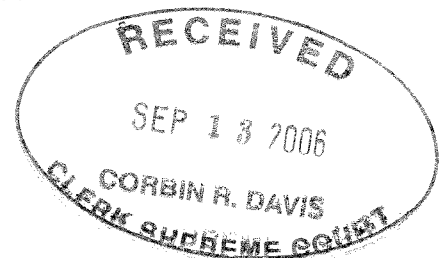
JEFFREY GORTON, VICTOR NEIBERG,
TODD MICHAEL BAKOS, MFO MANAGEMENT
COMPANY and the ESTATE OF RUTH R. MOTT,

Defendants.

DAVID A. BINKLEY (P-31643)
Attorney for Plaintiff/Appellee
101 W. Big Beaver Road, Tenth Floor
Troy, MI 48084
(248) 457-7000

NOREEN L. SLANK (P-31964)
Attorney for Defendant MFO
4000 Town Center, Ste. 909
Southfield, MI 48075
(248) 355-4141

EDWARD B. DAVISON (P-26421)
Attorney for Defendants/Appellants
G-8455 S. Saginaw Street, Ste. 2
Grand Blanc, MI 48439
(810) 234-3633



**DEFENDANTS/APPELLANTS' BUCKLER LAWN SPRINKLER
AND GORTON BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED**

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	ii
STATEMENT OF BASIS OF JURISDICTION	iv
STATEMENT OF QUESTIONS INVOLVED.....	v
STATEMENT OF FACTS AND PROCEEDINGS	1
ARGUMENT	5
I. DID THE COURT OF APPEALS IMPERMISSABLY EXPAND THE COMMON LAW DISCOVERY RULE TO PROVIDE THAT THE INSTANT CAUSE OF ACTION DID NOT ACCRUE UNTIL THE IDENTITY OF THE MURDERER, JEFFREY GORTON, WAS ASCERTAINED?	5
A) Standard of Review	5
B) Introduction	5
C) Legal Discussion	7
II. IS THE COMMON LAW "DISCOVERY RULE" INCONSISTENT WITH OR CONTRAENE MCL 600.5827 SO THAT PRIOR DECISIONS WHICH HAVE RECOGNIZED AND APPLIED SUCH A DISCOVERY RULE SHOULD BE OVERRULED?	13
A) Standard of Review	13
B) Nature and Application of the Common Law Discovery Rule	13
C) The "Discovery Rule" versus the Statute.....	17
CONCLUSION AND PRAYER FOR RELIEF	21

INDEX OF AUTHORITIES

Cases

Anderson v Ford Motor Company, (No. 246502, 246690, October 26, 2004)	8
Boyle v General Motors Corp, 468 Mich 226 (2003).....	5, 12
Brown v Drake-Willock International, 209 Mich App 136 (1995).....	9
Chase Securities Corp v Donaldson, 325 U.S. 304, 65 S Ct 1137, 89 L Ed 1628 (1945)	5
Chase v Sabin 445 Mich 190 (1994)	7, 14, 15
Connelly v Paul Ruddy's Equipment Repair and Service Co, 388 Mich 146; 200 NW2d 70 (1972)	7, 14, 15, 17
Crane v Glover, (No. 207847, April 21, 2001).....	8
DeVillers v ACIA, 473 Mich 562 (2005)	18, 19
DiBenedetto v West Shore Hospital, 461 Mich 394 (2000).....	17
Hall v Fortino, 158 Mich App 653 (1986)	9
Holley v Clark Seed, Inc, (No. 223749, September 21, 2001)	11
In re MCI, 460 Mich 396 (1999)	17
Johnson v Caldwell, 371 Mich 368 (1963).....	14
Larsen v Johns-Manville Corp, 427 Mich 301 (1986)	16, 19
LeFevre v American Red Cross, 108 Mich App 69 (1981)	9
Michigan Millers Mutual v West Detroit Building Co, 196 Mich App 367 (1992)	7
Miller v Mercy Memorial Hospital, 466 Mich 196 (2002)	10
Mills v Habluzel, 456 US 91 102 S Ct 1549, 71 L Ed 2d 770 (1982)	5
Moll v Abbott Laboratories, 444 Mich 1 (1993)	7, 15
Nawrocki v Macomb County Road Commission 463 Mich 143 (2000)	20, 21
Peltier v Eldredge, 131 Mich App 533 (1983)	9
Poffenbarger v Kaplan, 224 Mich App 1 (1997).....	10
Pohutski v City of Allen Park, 465 Mich 675, 683; 641 NW2d 219(2002)	5, 17
Price v Hopkin, 13 Mich 318 (1886).....	14, 19
Ruffin v Parekh (No. 204838, December 22, 1998).....	11
Sington v Chrysler Corp 467 Mich 144 (2002).....	13
Smith v Sinai Hospital, 152 Mich App 716 (1986).....	9
Stephens v Dixon, 449 Mich 531 (1995).....	6, 7, 8, 19
Thomas v Ferndale Laboratory, 97 Mich App 718 (1980)	9
Thomas v Process Equipment Corp, 154 Mich App 78 (1986).....	9
Trentadue v Buckler Automatic Lawn Sprinkler Co, 266 Mich App 297 (2005) ...	4, 11, 16
Weisburg v Lee, 61 Mich App 443 (1987).....	9
Wetzel v Consumers' Power Co (No. 202570, Oct. 30, 1998) lv den 461 Mich 853 (1999).....	10

Statutes

MCL 600.5827	7, 8, 12, 14, 17, 18
MCL 600.5833	18
MCL 600.5838	18

Other Authorities

The Discovery Rule in New Jersey; Unlimited Limitation on the Statute of Limitations, 42 Rutgers LR 205, 211-212(1989).....	19
---	----

STATEMENT OF BASIS OF JURISDICTION

This Court granted the application for leave to appeal by order dated July 19, 2006. This Court has jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS INVOLVED

I. DID THE COURT OF APPEALS IMPERMISSABLY EXPAND THE COMMON LAW DISCOVERY RULE TO PROVIDE THAT THE INSTANT CAUSE OF ACTION DID NOT ACCRUE UNTIL THE IDENTITY OF THE MURDERER, JEFFREY GORTON, WAS ASCERTAINED?

PLAINTIFF/APPELLEE SAYS: NO

DEFENDANTS/APPELLANTS SAY: YES

II. IS THE COMMON LAW "DISCOVERY RULE" INCONSISTENT WITH OR CONTRAVENE MCL 600.5827 SO THAT PRIOR DECISIONS WHICH HAVE RECOGNIZED AND APPLIED SUCH A DISCOVERY RULE SHOULD BE OVERRULED?

PLAINTIFF/APPELLEE SAYS: NO

DEFENDANTS/APPELLANTS SAYS: YES

STATEMENT OF FACTS AND PROCEEDINGS

Defendants Shirley and Laurence Gorton, individually and d/b/a Buckler Automatic Lawn Sprinkler Company (hereinafter Defendants Buckler) incorporate the following facts as set forth in the Opinion and Order of the trial court from which appeal is sought:

"This action has its genesis in the November 7, 1986, rape and murder of the University of Michigan - Flint Provost Margarette Eby at her domicile in the gatehouse on the premises of Applewood, the Estate of Ruth R. Mott. The gatehouse included a residence leased by Margarette Eby and a common area in the basement where sprinkler valves for the Estate were located. Flint Police investigated the murder scene and collected evidence including a fingerprint from an upstairs bathroom sink faucet and DNA evidence from Margarette Eby's body. The crime went unsolved for nearly 16 years.

On February 8, 2002, Jeffrey Gorton, an employee of Buckler Automatic Lawn Sprinkler Company ("Buckler Law"), was arrested and charged with the murder of Margarette Eby through analysis of DNA evidence. Jeffrey Gorton pled no contest to these charged in Genesee County Circuit Court on January 6, 2003, and is currently serving a life sentence for the offense."

On August 2, 2002, plaintiff filed its complaint herein alleging the following theories of recovery against Defendants Buckler:

- A. Breach of a duty to conduct a reasonable preemployment investigation of potential employees;
- B. Breach of a duty to properly supervise employees;
- C. Breach of a duty to not retain employees who pose a possible threat of harm to others;
- D. Placing their employee in a position where he would come in contact with

customers in their homes, presenting an opportunity for a sexual assault.

On September 6, 2002, in lieu of filing responsive pleadings, Defendants Buckler filed a motion for summary disposition based upon the applicable statute of limitations. Subsequently, all Defendants, save Jeffrey Gorton, filed similar motions. Oral argument was had on all motions on March 13, 2003. By Opinion and Order dated October 28, 2003, the trial court denied the motion of Defendants Buckler. In doing so, the trial court ruled that no cause of action against Defendants Buckler accrued until after the identity of the murderer (i.e., Jeffrey Gorton) had been ascertained:

"COUNT I.

Plaintiff brings Count I against Buckler Lawn and Shirley and Laurence Gorton, asserting that Buckler Lawn and Shirley and Laurence Gorton had a duty to conduct a reasonable pre-employment investigation of potential employees to determine whether they might pose a potential threat to Buckler's customers . . .

While defendants had a duty, there is no way to determine a breach of duty or causation without knowing the identity of the killer. . .

COUNT II

Plaintiff brings Count II against Shirley and Laurence Gorton, asserting that they breached a duty to properly supervise their employees by permitting employee Jeffrey Gorton access to personal residences without adequate supervision . . .

Because Plaintiff could not know that an employer had potential liability for the murder of Margarette Eby until the identity of the killer was ascertained and it became known that the killer was an employee and that the employment may have some link to the murder, the elements of the claim are not satisfied until the identity of the killer as Jeffrey Gorton was known in February 2002.

COUNT III

Plaintiff brings Count III against Shirley and Laurence Gorton, asserting that they breached a duty not to retain employees whom they knew or should have known posed a possible threat of harm to others by permitting Jeffrey Gorton to enter individual customer's homes when they knew or should have known that Jeffrey Gorton posed a possible threat of harm to others because he had been previously convicted of criminal sexual conduct . . .

Again, plaintiff could not have known that an employer had potential liability for Margarete Eby's death until the identity of Jeffrey Gorton as Margarete Eby's killer was ascertained and it was known that Jeffrey Gorton was employed by Shirley and Laurence Gorton. The statute of limitations did not begin to run until February 2002 . . .

COUNT IV

Plaintiff brings Count IV against Shirley and Laurence Gorton based upon the Doctrine of Respondeat Superior . . . Because plaintiff could not know that an employer was potentially liable for the actions of an employee until the identity of the killer was ascertained and it was determined that the killing was potentially facilitated through the killer's employment, the elements of the cause action were not satisfied until the identity of the killer as Jeffrey Gorton was ascertained in February 2002." (Emphasis added).

Similar rulings were made by the court as to the summary disposition motions of the other defendants. The court did, however, grant summary disposition in favor of the Estate of Ruth R. Mott and MFO on Count VIII:

"COUNT VIII

Plaintiff brings Count VIII against the Estate of Ruth R. Mott and MFO for breaching a duty to provide adequate security to prevent reasonably foreseeable harm . . .

Plaintiff should have known that this cause of action existed at the time of Margarete Eby's murder in 1986. Although the identity of the killer was not known, plaintiff should have recognized in 1986 that the security provided by the Estate of Ruth R. Mott and MFO was inadequate,

thereby allowing *someone* access to the premises to attack and kill Margarette Eby. This court concludes that plaintiff's claims in Count VIII against the Estate of Ruth R. Mott and MFO are barred by the applicable statute of limitations. Summary disposition pursuant to MCR 2.116(C)(7) is GRANTED on Count VIII only."

All parties sought leave to appeal to the Court of Appeals. Leave was granted by order dated March 14, 2004. Following oral argument, on March 24, 2005 the Court of Appeals released its opinion, Trentadue v Buckler Automatic Lawn Sprinkler Co, 266 Mich App 297 (2005), upholding denial of Defendant's motion for summary disposition. In doing so, the court held, in part:

"The discovery rule applies when an element of a cause of action has occurred but is undiscoverable using reasonable diligence for a period of time [citation omitted]. With respect to Plaintiff's claims against Buckler, the Gortons, Neiberg and Bakos, the relationship between Buckler, the Gortons, Neiberg and Bakos to Eby's killer could not be discovered by Plaintiff, under the circumstances of this case, until Jeffrey Gorton was determined to be the killer, or the means of access of Eby's killer into her residence was determined.¹ Thus, Plaintiff was not aware of a possible cause of action until that time. We reject Defendants' argument that the discovery rule is inapplicable because this is simply a case of unknown identity, and the courts have consistently held that the rule is inapplicable in such cases. This is not a case where Plaintiff knew of an injury and its cause, but did not know the identity of the actor. Plaintiff knew that Eby was murdered, but did not know that anyone had caused Eby harm other than the killer. Plaintiff could not have known of a cause of action against anyone in Buckler's, the Gortons', Neiberg's or Bakos' positions until the facts of the murder were uncovered." *Id* at 302-3

This Court granted leave to appeal by Order dated July 19, 2006.

¹ This still hasn't been "determined"!

ARGUMENT

I. DID THE COURT OF APPEALS IMPERMISSABLY EXPAND THE COMMON LAW DISCOVERY RULE TO PROVIDE THAT THE INSTANT CAUSE OF ACTION DID NOT ACCRUE UNTIL THE IDENTITY OF THE MURDERER, JEFFREY GORTON, WAS ASCERTAINED?

PLAINTIFF/APPELLEE SAYS: NO

DEFENDANTS/APPELLANTS SAY: YES

A) Standard of Review

"We review *de novo* the interpretation and application of a statute as a question of law. If the language of the statute is clear, no further analysis is necessary or allowed. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219(2002). In the absence of disputed facts, the question whether a cause of action is barred by the statute of limitations is also a question of law. *Moll v Abbott Laboratories*, 440 Mich 1, 26; 506 NW2d 816(1993)." *Boyle v General Motors Corp*, 468 Mich 226, 229-230 (2003).

B) Introduction

Sixty years ago the U.S. Supreme Court enunciated the public policy behind statutes of limitation:

"Statutes of limitation find their justification in necessity and convenience rather than in logic ... They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Mills v Habluzel*, 456 US 91, 102, 102 S Ct 1549, 71 L Ed 2d 770 (1982) quoting *Chase Securities Corp v Donaldson*, 325 U.S. 304, 314, 65 S Ct 1137, 89 L Ed 1628 (1945).

This court has recognized that the same public policy applies to statutes of limitations in Michigan:

“Statutes of limitation are procedural devices intended to promote judicial economy and the rights of Defendants. For instance, they protect Defendants in the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence. They also prevent Plaintiffs from sleeping on their rights; a Plaintiff who delays bringing an action profits over an unsuspecting Defendant who must prepare a defense long after the event from which the action arose.” Stephens v Dixon, 449 Mich 531, 534 (1995). (Emphasis added).

In ruling as they did, both the trial court and the Court of Appeals ignored this declared public policy. Instead, they ruled that in cases of criminal wrongdoing where the criminal actor could not be identified and that the criminal actor's identity was necessary in order to understand the relationship between the criminal actor and other “collateral” Defendants so that Plaintiff might allege the existence of a duty and its breach, the cause of action did not accrue, and therefore the statute of limitations did not commence running, until the identity of the criminal wrongdoer was discovered. This analysis of the trial court and the Court of Appeals completely overlooks the stated public policy behind statutes of limitations as described above, i.e. relieving Defendants of the obligation of defending cases “ ... in which the search for truth may be seriously impaired by the loss of evidence ...” as well as the numerous decisions which have refused to invoke the “discovery rule” in cases where identity of a tort feisor cannot be ascertained.

The rule announced by the Court of Appeals will have the effect of negating any statute of limitations, for any period of time, in cases where the identity of the principal, or acting, tort feisor cannot be ascertained. This will result in the anomalous situation where, through the passage of time, a criminal wrongdoer will no longer have to answer

to society or his victim either criminally or civilly, yet those associated with the criminal wrongdoer will! This stands the public policy behind statutes of limitations on its head!

C) Legal Discussion

Statutes of limitation afford security against fraudulent or stale claims, which become difficult to defend because of the loss of evidence, and relieve a court system from dealing with such claims. Moll v Abbott Laboratories, 444 Mich 1 (1993). Exceptions to statutes of limitation are to be construed strictly. Michigan Millers Mutual v West Detroit Building Co, 196 Mich App 367 (1992).

A claim accrues ". . .at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. In Stephens v Dixon, 449 Mich 531 (1995), this Court observed in analyzing the definition of the term "wrong" as used in MCL 600.5827:

"We have held that the term "wrong" as used in the accrual provision refers to the date on which the Plaintiff was harmed by the Defendants' act, not the date on which the Defendant acted negligently. *Id* at 534-5. A simple negligence cause of action accrues when a prospective Plaintiff first knows or reasonably should know he is injured." *Id* at 538.

See also Chase v Sabin 445 Mich 190, 196 (1994):

"Our adherence to this principal resulted in our holding that the term 'wrong' as stated in the accrual statute, designated the date on which the plaintiff was harmed by the defendant's negligent act as opposed to the date the defendant acted negligently. Connelly v Paul Ruddy's Equipment Repair and Service Co, 388 Mich 146; 200 NW2d 70 (1972) Necessity dictated such a conclusion because an opposite interpretation could potentially bar a plaintiff's legitimate cause of action before the plaintiff's injury."

In the instant case, there is no dispute that the various wrongs alleged by Plaintiff

against Defendants Buckler, as well as all of the damages sustained by Plaintiff's decedent and her survivors, occurred on or before November 7, 1986.

Our appellate courts have construed MCL 600.5827 on numerous occasions. Those cases, discussed *infra*, hold that the common law discovery rule provides that a cause of action accrues either:

- a) at the time when all of the elements of the claim exist,
or
- b) at the time when all of the elements of the claim are,
or reasonably should, be known and can be alleged.

However, prior appellate decisions are clear that the common law discovery rule is not to be employed in cases of simple negligence:

"Indeed, this plaintiff knew or should have known from the day of the accident that a possible cause of action existed for a neck injury resulting from the accident.²

A simple negligence cause of action accrues when a prospective plaintiff first knows or reasonably should know he is injured." Stephens, supra at 538

²"The facts of this case do not present a situation in which the plaintiff did not know she was injured at the date of the accident, and we express no opinion about whether the statute of limitations should be tolled in such a case."

See also, Anderson v Ford Motor Company, (No. 246502, 246690, October 26, 2004) and Crane v Glover, (No. 207847, April 21, 2001).

Likewise, our appellate courts have consistently refused to apply the discovery rule to the discovery of the identities of possible tortfeasors:

"Plaintiff's argument manifests a misunderstanding of the discovery rule. That rule states 'that the period of limitation does not begin to run until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, that he had a possible cause of action.' *Thomas*

v Process Equipment Corp, 154 Mich App 78, 88; 397 NW2d 224 (1986). It is clear that the discovery rule pertains to discovery of a specific injury . . . not to discovering the identities of all the possible parties. *Thomas, supra*. Our courts consistently have held that the statute of limitations is not tolled pending discovery of the identity of the parties where all the elements of the cause of action exist. *Thomas, supra*, at 88." *Brown v Drake-Willock International*, 209 Mich App 136, 142 (1995). (emphasis added)

That the "discovery rule" does not apply to issues involving the identity of the alleged wrongdoer was announced by our Court of Appeals over 20 years ago:

"The sole issue on appeal is: can the running of the statute of limitations be delayed until the plaintiff becomes aware of the identify of the alleged tort feasor, when that knowledge is ascertained after the date that all of the elements of the cause of actions have occurred? We answer in the negative and conclude that the trial court erred in denying the motion for accelerated judgment." *Thomas v Ferndale Laboratory*, 97 Mich App 718, 720 (1980).

and has been reiterated regularly since then:

"Plaintiff also argues that the motion for accelerated judgment was improperly granted because factual questions existed as to whether she could have discovered the identity and involvement of the defendant sooner. Accelerated judgment is improper where material factual disputes exist regarding discovery of the alleged malpractice. . . . However, the 'time of discovery' rule relates to the discovery of the asserted malpractice and not the discovery of defendant's identity or involvement." *LeFevre v American Red Cross*, 108 Mich App 69, 74 (1981).

See also *Peltier v Eldredge*, 131 Mich App 533, 536 (1983); *Smith v Sinai Hospital*, 152 Mich App 716, 726 (1986); *Hall v Fortino*, 158 Mich App 653 (1986); Quoted with approval in *Weisburg v Lee*, 61 Mich App 443, 448 (1987) and *Thomas v Process Equipment Corp*, 154 Mich App 78, 88 (1986):

"The problem with plaintiffs' position is that they apply the

discovery rule in a context in which it is not designed to apply. In both *Bonney* and *Cullender*, the delay in discovery was not that of the identity of the alleged tortfeasor, but was a delay in discovering that a disease was related to exposure to certain products (i.e., the element of proximate cause). As this court stated in *Reiterman v Westinghouse* [106 Mich App 698 (1981)] p. 704:

'There is a plethora of case law holding that the statute of limitations is not tolled pending discovery of the identity of the alleged tortfeasor where all the other elements of the cause of action exist.'

This was reiterated more recently by our Court of Appeals:

"That plaintiff initially may not have been aware of Dr. Kaplan's identity does not alter her duty of diligence in discovering a potential cause of action. The discovery period applies to discovery of a possible claim, not the discovery of the defendant's identity." Poffenbarger v Kaplan, 224 Mich App 1, 12 (1997), overruled on other grounds. Miller v Mercy Memorial Hospital, 466 Mich 196 (2002).

and again in Wetzel v Consumers' Power Co (No. 202570, Oct. 30, 1998); lv den 461 Mich 853 (1999):

"At issue is when Plaintiff's claim accrued and began the running of the three-year period ... When the tortious conduct and injury are contemporaneous or in proximity, there is no question as to how this statute applies. However, the appropriate application of this statute is called into question where there is a lengthy period between the tortious conduct and the resultant damage; or when there is a delay between the damage and the Plaintiff's discovery of a causal connection between the Defendant's conduct and the damage. Our Supreme Court has held that 'the term 'wrong' ', as used in the accrual statute, specified the date on which the Defendant's breach harmed the Plaintiff, as opposed to the date on which the Defendant breached his duty." [citation omitted]. This interpretation avoids the absurd result of the statute of limitations running before the Plaintiff knows that he is injured.

* * *

Further, a Plaintiff need not be aware of the identity of the person causing the injury. [citation omitted]. The discovery rule applies to the discovery of a specific injury, not to the discovery of the identities of all the possible parties".

as well as in the more recent unpublished opinions of Ruffin v Parekh (No. 204838, December 22, 1998) and Holley v Clark Seed Inc. (No. 223749, September 21, 2001):

"It is well settled that accrual of a cause of action is not delayed until the plaintiff discovers the identity of the tortfeasor that might be ultimately liable for her injuries. . . . the case law makes it clear that a cause of action accrues regardless of the plaintiff's ability to identify a particular defendant or the precise mechanism that led to her injury The fact that a complex investigation was required to determine which entity along the distribution chain was ultimately responsible for the contamination does not alter the fact that she could have pleaded a proper cause of action in 1995."

Using tortured logic, however, the Court of Appeals declared that this was not a case of unknown identity:

"With the respect to plaintiff's claims against Buckler. . .the relationship of Buckler. . .with Eby's killer could not be discovered by plaintiff, under the circumstances of this case, until Jeffrey Gorton was determined to be the killer or the means of access of Eby's killer into her residence was determined. Thus, plaintiff was not aware of a possible cause of action until that time. We reject defendants' argument that the discovery rule is inapplicable because this is simply a case of unknown identity, and the courts have consistently held that the rule is inapplicable in such cases. This is not a case in which plaintiff knew of an injury and its cause, but did not know the identity of the actor. Plaintiff knew that Eby was murdered, but did not know that anyone had caused Eby harm other than the killer. Plaintiff could not have known of a cause of action against anyone in Buckler's. . .positions until the facts of the murder were uncovered." Trentadue, supra at 302-3 (emphasis added)

Such a statement is sophistry. By the language of their opinion, the Court of Appeals

acknowledged that the element which was unknown was not the injury to Plaintiff's decedent, but only the identity of the murderer. Application of the discovery rule to these facts is diametrically opposite to the holding in the plethora of cases which have rejected application of the discovery rule to the identity of the wrongdoing tortfeasor.

This Court has continued to show its reluctance to expand the "discovery rule" to other than pharmaceutical and medical malpractice claims. In Boyle v General Motors Corp, 468 Mich 226 (2003) this Court refused to extend the "discovery rule" to claims based upon fraud:

"We reverse the judgment of the Court of Appeals and reinstate the order of the circuit court [granting summary disposition] because MCL 600.5827 clearly applies and because prior decisions of this Court rejecting a discovery rule in fraud cases have never been overruled." *Id*, at 227.

At the very least, this Court should again reiterate that the common law discovery rule does not apply to cases in which the identity of the wrongdoer is unknown even where this lack of knowledge of the identity precludes knowledge of potential causes of action for a known, discoverable injury.

II. IS THE COMMON LAW "DISCOVERY RULE" INCONSISTENT WITH OR CONTRAVENE MCL 600.5827 SO THAT PRIOR DECISIONS WHICH HAVE RECOGNIZED AND APPLIED SUCH A DISCOVERY RULE SHOULD BE OVERRULED?

PLAINTIFF/APPELLEE SAYS: NO

DEFENDANTS/APPELLANTS SAYS: YES

A) Standard of Review

"In considering whether to overrule a prior decision of this Court, the first inquiry, of course, is whether that prior decision was wrongly decided. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 757; 641 NW 2d 567 (2002); Robinson, supra at 464

* * *

Nevertheless, as we recognized in Robinson, that a prior case was wrongly decided 'does not mean overruling it is invariably appropriate.' Robinson, supra at 465 We must consider whether overruling a prior erroneous decision would work an undue hardship because of reliance interests or expectations and, conversely, whether the prior decision defies 'practical workability.' *Robertson, supra* at 757; Robinson, supra at 466. In particular,

'the Court must ask whether the previous decision has become so imbedded, so accepted, so fundamental to everybody's expectations that to change it would produce not just readjustments, but practical, real-world dislocations. It is in practice a prudential judgment for a court. [Id]'" Sington v Chrysler Corp 467 Mich 144, 162 (2002)

B) Nature and Application of the Common Law Discovery Rule

The genesis of Michigan's common law "discovery rule" can be traced to Justice Cooley over 140 years ago:

"The general power of the legislature to pass statutes of limitations is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative

judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power has been unwisely exercised. But the legislative authority is not so entirely unlimited that, under the name of a statute limiting the time in which a party shall resort to his legal remedy, all remedy whatsoever may be taken away ... It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought ..." Price v Hopkin, 13 Mich 318, 324-5(1886), cited in Chase v Sabin, 445 Mich 190, 196(1994).

Since that time, there have been numerous pronouncements of the "discovery rule" from prior panels of this Court. In Johnson v Caldwell, 371 Mich 368 (1963) this Court stated:

"Simply and clearly stated the discovery rule is: the limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act." Id at 379

Subsequently, the Legislature enacted the Revised Judicature Act, containing MCL 600.5827, which provided, in relevant part:

"The claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

In Connelly v Paul Ruddy's Co, 388 Mich 146 (1972) this Court determined that the term "wrong" as used in Section 5827 meant "injury":

"Once all of the elements of an action for personal injury, including the element of damage are present, the claim accrues and the statute of limitations begins to run. Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred." Id at 151.

This interpretation of "wrong" was subsequently reiterated by this Court in Chase v

Sabin, 445 Mich 190, 196 (1994):

"Our adherence to this principal resulted in our holding that the term 'wrong', as stated in the accrual statute, designated the date on which the plaintiff was harmed by the defendant's negligent act, as opposed to the date the defendant acted negligently. *Connelly* [citation omitted] Necessity dictated such a conclusion because an opposite interpretation could potentially bar a plaintiff's legitimate cause of action before the plaintiff's injury."

The Connelly court also suggested that once all elements of a cause of action existed, and that plaintiff had knowledge that they had been injured, the cause of action accrued:

"Once all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run." Id at 151

Subsequently, however, this Court gave conflicting statements as to the application of the discovery rule to particular cases. Was the existence of all elements of the cause of action plus knowledge of the injury sufficient, or did plaintiff have to have knowledge of all of the elements of the cause of action, including injury, before the cause accrued? This confusion can be traced back to Moll v Abbott Laboratories, 444 Mich 1 (1993).

There, Justice Cavanaugh wrote:

"Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action. We see no need to further protect the rights of the plaintiff to pursue a claim, because the plaintiff at this point is equipped with sufficient information to protect the claim. This puts the plaintiff, whose situation at one time warranted the safe harbor of the discovery rule, on equal footing with other tort victims whose situation did not require the discovery rule's protection. This position is consistent with the jurisprudence of our State.

'It is not necessary that a party should know the details of the evidence by which to

establish his cause of action. It is enough that he knows a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claims." Id at 24

However, earlier Justice Cavanaugh had opined:

"A cause of action for personal injuries accrues when a person can allege, in a complaint, each element of the asserted claim. Generally, a well-pleaded claim for personal injury must allege that 1) the defendant owed the plaintiff a legal duty, 2) the defendant breached the duty, 3) the defendant's breach was the proximate cause of the plaintiff's injuries, and 4) damages. " Id at 15-16

This seems to have expanded the "discovery rule" to cases beyond simply knowledge of an injury. Now, it seemed that the discovery rule would delay accrual of a cause of action until the plaintiff had knowledge, and the ability to plead, all elements of that cause of action. Certainly, this is the construction placed upon the "discovery rule" by the Court of Appeals in this case:

"A discovery rule has been applied to avoid unjust results that would occur when a reasonable and diligent plaintiff would be denied the opportunity to bring a claim because of either the latent nature of the injury or the inability of the plaintiff to learn of identify the causal connection between the injury and the breach of a duty owed by a defendant." Trentadue, supra at 301

The practical effect of such an expansive reading of the "discovery rule" is to render legislatively enacted statutes of limitations meaningless and give the court unbridled discretion to decide when a cause of action accrues. Indeed, such a position was espoused by Justice Williams in Larsen v Johns-Manville Corp, 427 Mich 301, 310 (1986):

"Clearly when the situation requires it, this Court will apply the discovery rule to determine the date of accrual." Id at 310

C) The "Discovery Rule" versus the Statute

With adoption of the Revised Judicature Act, the Legislature announced its intention to provide structure and uniformity to Michigan jurisprudence regarding accrual of causes of action. In this regard, and subject only to certain statutory exceptions, the Legislature provided that:

". . .the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827

It is clear beyond peradventure that the judiciary does retain the right, indeed the obligation, to engage in statutory construction where the words of the Legislature render the statute ambiguous. In re MCI, 460 Mich 396, 411 (1999) To this end, prior panels of this Court have construed the term "wrong" as contained within Section 5821 to mean "injury". Connelly, supra However, it is likewise clear beyond peradventure that this Court may not engage in statutory construction if there exists no uncertainty or ambiguity in the statutory language. Pohutski, supra; DiBenedetto v West Shore Hospital, 461 Mich 394, 402 (2000) While one may debate whether the term "wrong" is ambiguous, it has never been construed by this Court more broadly than "injury". Similarly, none of the cases which have defined or applied the common law "discovery rule" have done so based upon a further perceived or claimed ambiguity in the accrual statute. Adoption of the discovery rule, then, cannot be seen as a legitimate function of the judicial branch of our tripartite government. Rather, maintenance of the "discovery rule" by prior panels of this Court is nothing more or less than a judicial pronouncement

of what the law should be, rather than what the Legislature has stated the law shall be. This is particularly evident as the Legislature has chosen to enact statutory "discovery rule" provisions regarding accrual of certain types of actions, such as breach of warranty claims (MCL 600.5833) and malpractice claims (MCL 600.5838). Had the Legislature chosen to enact a general "discovery rule", it would have been a simple matter to have provided so within MCL 600.5827. The Legislature having chosen not to, it is inappropriate for this Court to do so. As this Court most recently stated in DeVillers v ACIA, 473 Mich 562, 582-3 (2005):

"Statutory - or contractual - language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court.

* * *

Although a claimant may well find himself in a bind similar to that of the *Lewis* plaintiffs, and of the plaintiff in the case at bar, should that claimant delay the commencement of an action (as permitted by Section 3145) more than one year beyond the accident leading to the injury, our observation is simply this: The Legislature has made it so. The *Lewis* Court acted outside its constitutional authority in importing its own policy views into the text of Section 3145(1). '[T]he constitutional responsibility of the judiciary is to act in accordance with the constitution and its system of separated powers, by exercising the judicial power and only the judicial power.'"

Adoption of the discovery rule does just that and frustrates the underlying philosophy behind a legislatively imposed period of limitations:

"While providing equitable relief to Plaintiffs otherwise barred by a strict application of the statute of limitations, the discovery rule also threatens legitimate interests of the Defendant which the statute protects. While it may be harsh to bar the action of a Plaintiff who, through no fault of his own, did not discover his injury until after the running of the statute, it is also unfair ... to compel a Defendant to answer

a charge arising out of events in the distant past. The discovery rule tends to undermine the sense of security that the statute of limitations was designed to provide, namely, that at some point a person is entitled to put the past behind him and leave it there." Stephens v Dixon, 449 Mich 531, 536 (1995) quoting from Olsen, *The Discovery Rule in New Jersey; Unlimited Limitation on the Statute of Limitations*, 42 Rutgers LR 205, 211-212(1989).

What, then, of Justice Cooley's previously cited comments from Price v Hopkin, *supra*?

The answer of the DeVillers majority to Justice Cavanaugh applies equally to the prior comments of Justice Cooley:

"The fundamental difference between the position of the majority and Justice [Cooley] lies in how one perceives the judicial role.

The majority believes that statutes are to be enforced as *written* unless, of course, a statute violates the Constitution. Such a view of the judicial role is not merely a preference shared by a majority of this Court, but rather a Constitutional mandate. Justice [Cooley], on the other hand, apparently believes that a court's equitable power is an omnipresent and unassailable judicial trump card that can be used to re-write a constitutionally valid statute simply because a particular judge considers the statute to be 'unfair'.

* * *

The majority believes that policy decisions are properly left for the people's elected representatives in the Legislature, not the judiciary. The Legislature, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice. Justice [Cooley], however, apparently believes that judges are omniscient and may, under the veil of equity, supplant a specific policy choice adopted on behalf of the people of Michigan by their elected representatives in the Legislature. We could not disagree more." DeVillers, *supra* at 588-9

Prior panels of this Court clearly exceeded their Constitutional powers to abrogate the clear and unambiguous language of the accrual statute by applying the discovery rule "

. .when the situation requires it." Larsen, *supra* at 310.

Overruling prior decisions of this Court is not something that is to be undertaken lightly. Nawrocki v Macomb County Road Comm, 463 Mich 143, 151 (2000). However, it is clear that the post-Revised Judicature Act decisions of this Court which grafted the common law discovery rule onto the legislative accrual statute impermissibly usurped the constitutionally granted power of the Legislature. Those prior decisions should now be overruled, thus allowing the Legislature to enact such a general "discovery rule" in accordance with its constitutional powers, should it deem doing so to be in the best interest of the people of the State of Michigan.

CONCLUSION AND PRAYER FOR RELIEF

The use of the "discovery rule" by the courts below to preclude accrual of a cause of action against Defendants Buckler until the identity of Jeffrey Gorton as the murderer of Plaintiff's decedent could be ascertained, and thus the relationship between Defendants Buckler and Jeffrey Gorton discovered and "categorized", was an extension of the "discovery rule" which has been rejected on numerous occasion by prior appellate courts. Because the cause of action alleged by the Plaintiffs against Defendants Buckler is a simple negligence action, and thus of a type where the proofs upon which Defendants Buckler must rely are subject to degradation/loss through the passage of time, the equities upon which the statute of limitations is based call for rejecting application of the "discovery rule".

Statutes of limitations are, by their very nature, arbitrary and harsh. However, they are supported by sound public policy. Distilled to their essence, Plaintiff has pled theories of simple negligence against all Defendants. Never in such cases has any court, save the present panel of the Court of Appeals, allowed application of the discovery rule to preclude accrual of such a simple negligence action. This Court has refused to allow imposition of a particular panel's individual feelings on public policy by way of adding gloss to statutes enacted by the legislature:

“ ...we refuse to impose upon the people of this state our individual determinations of proper public policy, relating to the availability of lawsuits arising from injuries on the public highways. Rather, we seek to faithfully construe and apply those stated public policy choices made by the legislature when it drafted the statutory language ...” Nawrocki v Macomb County Road Comm, 463 Mich 143, 150-1 (2000).

The trial court and Court of Appeals did just that in this case – they applied the

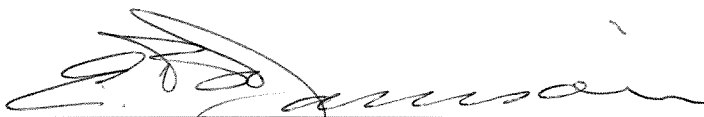
discovery rule without any consideration of the prejudice Defendants Buckler would face in defending a 16 year old claim. This Court should, at a minimum reiterate that the discovery rule is not available in simple negligence claims such as that presented here to save tardy cases occasioned by an inability to identify a criminal actor/tortfeasor.

More fundamentally, because the court created "discovery rule" is in clear conflict with the legislatively enacted discovery statute, this Court should consider overruling prior decisions adopting the common law "discovery rule" into Michigan jurisprudence, leaving such fashioning of public policy to the appropriate branch of the Michigan government - the Legislature.

Respectfully submitted,

GAULT DAVISON, P.C.

Dated: 9-12-06



EDWARD B. DAVISON (P-26421)
Attorney for Defendants/Appellants
Shirley and Laurence Gorton d/b/a
Buckler Automatic Lawn Sprinkler
Company